

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Accusation
Against:**

MICHAEL WARREN CLUCK, M.D.

Case No. 800-2016-020634

**Physician's and Surgeon's
Certificate No. A76201**

Respondent

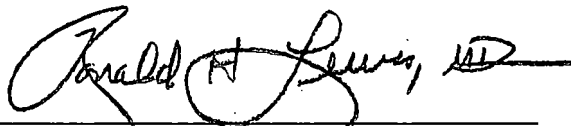
DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 5, 2019.

IT IS SO ORDERED: June 5, 2019.

MEDICAL BOARD OF CALIFORNIA



**Ronald H. Lewis, M.D., Chair
Panel A**

1 XAVIER BECERRA
Attorney General of California
2 JANE ZACK SIMON
Supervising Deputy Attorney General
3 EMILY L. BRINKMAN
Deputy Attorney General
4 State Bar No. 219400
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
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7 *Attorneys for Complainant*

8
9 **BEFORE THE**
MEDICAL BOARD OF CALIFORNIA
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12
13 In the Matter of the Accusation Against:

Case No. 800-2016-020634

14 **MICHAEL WARREN CLUCK, M.D.**
2516 Samaritan Dr., Suite B
15 San Jose, CA 95124-4108

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

16 **Physician's and Surgeon's Certificate**
17 **No. A 76201**

Respondent.

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19
20 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
21 entitled proceedings that the following matters are true:

22 PARTIES

23 1. Kimberly Kirchmeyer (Complainant) is the Executive Director of the Medical Board
24 of California (Board). She brought this action solely in her official capacity and is represented in
25 this matter by Xavier Becerra, Attorney General of the State of California, by Emily L. Brinkman,
26 Deputy Attorney General.

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2. Respondent Michael Warren Cluck, M.D. (Respondent) is represented in this proceeding by attorney Tom Still, whose address is: Hinshaw, Marsh, Still & Hinshaw, LLP, 12901 Saratoga Ave., Saratoga, CA 95070.

3. On or about August 15, 2001, the Board issued Physician's and Surgeon's Certificate No. A 76201 to Michael Warren Cluck, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought in Accusation No. 800-2016-020634, and will expire on April 30, 2019, unless renewed.

JURISDICTION

4. Accusation No. 800-2016-020634 was filed before the Board, and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on December 12, 2018. Respondent timely filed his Notice of Defense contesting the Accusation.

5. A copy of Accusation No. 800-2016-020634 is attached as exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

6. Respondent has carefully read, fully discussed with counsel, and understands the charges and allegations in Accusation No. 800-2016-020634. Respondent has also carefully read, fully discussed with counsel, and understands the effects of this Stipulated Settlement and Disciplinary Order.

7. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

8. Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

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1 CULPABILITY

2 9. Respondent does not contest that, at an administrative hearing, complainant could
3 establish a prima facie case with respect to the charges and allegations contained in Accusation
4 No. 800-2016-020634 and that he has thereby subjected his Physician's and Surgeon's Certificate
5 No. A 76201 to disciplinary action.

6 10. Respondent agrees that if he ever petitions for early termination or modification of
7 probation, or if an accusation and/or petition to revoke probation is filed against him before the
8 Board, all of the charges and allegations contained in Accusation No. 800-2016-020634 shall be
9 deemed true, correct and fully admitted by Respondent for purposes of any such proceeding or
10 any other licensing proceeding involving Respondent in the State of California.

11 CONTINGENCY

12 11. This stipulation shall be subject to approval by the Medical Board of California.
13 Respondent understands and agrees that counsel for Complainant and the staff of the Medical
14 Board of California may communicate directly with the Board regarding this stipulation and
15 settlement, without notice to or participation by Respondent or his counsel. By signing the
16 stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek
17 to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails
18 to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary
19 Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal
20 action between the parties, and the Board shall not be disqualified from further action by having
21 considered this matter.

22 12. The parties understand and agree that Portable Document Format (PDF) and facsimile
23 copies of this Stipulated Settlement and Disciplinary Order, including PDF and facsimile
24 signatures thereto, shall have the same force and effect as the originals.

25 13. In consideration of the foregoing admissions and stipulations, the parties agree that
26 the Board may, without further notice or formal proceeding, issue and enter the following
27 Disciplinary Order:

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DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. A 76201 issued to Respondent MICHAEL WARREN CLUCK, M.D. is revoked. However, the revocation is stayed and Respondent is placed on probation for three (3) years on the following terms and conditions.

1. CONTROLLED SUBSTANCES - ABSTAIN FROM USE. Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to Respondent by another practitioner for a bona fide illness or condition.

Within 15 calendar days of receiving any lawfully prescribed medications, Respondent shall notify the Board or its designee of the: issuing practitioner's name, address, and telephone number; medication name, strength, and quantity; and issuing pharmacy name, address, and telephone number.

If Respondent has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported the use to the Board or its designee, Respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The Respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification to cease practice. If the Respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the Respondent with a hearing within 30 days of the request, unless the Respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the

1 case, unless good cause can be shown for the delay. Good cause includes, but is not limited to,
2 non-adoption of the proposed decision, requests for reconsideration, remands and other
3 interlocutory orders issued by the Board. The cessation of practice shall not apply to the
4 reduction of the probationary time period.

5 If the Board does not file an accusation or petition to revoke probation within 30 days of the
6 issuance of the notification to cease practice or does not provide Respondent with a hearing
7 within 30 days of such a request, the notification of cease practice shall be dissolved.

8 2. ALCOHOL - ABSTAIN FROM USE. Respondent shall abstain completely from the
9 use of products or beverages containing alcohol.

10 If Respondent has a confirmed positive biological fluid test for alcohol, Respondent shall
11 receive a notification from the Board or its designee to immediately cease the practice of
12 medicine. The Respondent shall not resume the practice of medicine until the final decision on an
13 accusation and/or a petition to revoke probation is effective. An accusation and/or petition to
14 revoke probation shall be filed by the Board within 30 days of the notification to cease practice.
15 If the Respondent requests a hearing on the accusation and/or petition to revoke probation, the
16 Board shall provide the Respondent with a hearing within 30 days of the request, unless the
17 Respondent stipulates to a later hearing. The case is heard by an Administrative Law Judge
18 alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of
19 the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed
20 decision, the Board shall issues its Decision, unless good cause can be shown for the delay. If the
21 case is heard by the Board, the Board shall issue its decision within 15 days of submission of the
22 case, unless good cause can be shown for the delay. Good cause includes, but is not limited to,
23 non-adoption of the proposed decision, requests for reconsideration, remands and other
24 interlocutory orders issued by the Board. The cessation of practice shall not apply to the
25 reduction of the probationary time period.

26 If the Board does not file an accusation or petition to revoke probation within 30 days of the
27 issuance of the notification to cease practice or does not provide Respondent with a hearing
28 within 30 days of such a request, the notification of cease practice shall be dissolved.

1 3. BIOLOGICAL FLUID TESTING. Respondent shall immediately submit to
2 biological fluid testing, at Respondent's expense, upon request of the Board or its designee.
3 “Biological fluid testing” may include, but is not limited to, urine, blood, breathalyzer, hair
4 follicle testing, or similar drug screening approved by the Board or its designee. Prior to
5 practicing medicine, Respondent shall contract with a laboratory or service approved in advance
6 by the Board or its designee that will conduct random, unannounced, observed, biological fluid
7 testing. The contract shall require results of the tests to be transmitted by the laboratory or
8 service directly to the Board or its designee within four hours of the results becoming available.
9 Respondent shall maintain this laboratory or service contract during the period of probation.

10 A certified copy of any laboratory test result may be received in evidence in any
11 proceedings between the Board and Respondent.

12 If Respondent fails to cooperate in a random biological fluid testing program within the
13 specified time frame, Respondent shall receive a notification from the Board or its designee to
14 immediately cease the practice of medicine. The Respondent shall not resume the practice of
15 medicine until the final decision on an accusation and/or a petition to revoke probation is
16 effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30
17 days of the notification to cease practice. If the Respondent requests a hearing on the accusation
18 and/or petition to revoke probation, the Board shall provide the Respondent with a hearing within
19 30 days of the request, unless the Respondent stipulates to a later hearing. If the case is heard by
20 an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board
21 within 15 days of submission of the matter. Within 15 days of receipt by the Board of the
22 Administrative Law Judge’s proposed decision, the Board shall issue its Decision, unless good
23 cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its
24 decision within 15 days of submission of the case, unless good cause can be shown for the delay.
25 Good cause includes, but is not limited to, non-adoption of the proposed decision, requests for
26 reconsideration, remands and other interlocutory orders issued by the Board. The cessation of
27 practice shall not apply to the reduction of the probationary time period.

28 If the Board does not file an accusation or petition to revoke probation within 15 days of the

1 issuance of the notification to cease practice or does not provide Respondent with a hearing
2 within 30 days of such a request, the notification of cease practice shall be dissolved.

3 4. PROFESSIONALISM PROGRAM (ETHICS COURSE). Within 60 calendar days of
4 the effective date of this Decision, Respondent shall enroll in a professionalism program, that
5 meets the requirements of Title 16, California Code of Regulations (CCR) section 1358.1.
6 Respondent shall participate in and successfully complete that program. Respondent shall
7 provide any information and documents that the program may deem pertinent. Respondent shall
8 successfully complete the classroom component of the program not later than six (6) months after
9 Respondent's initial enrollment, and the longitudinal component of the program not later than the
10 time specified by the program, but no later than one (1) year after attending the classroom
11 component. The professionalism program shall be at Respondent's expense and shall be in
12 addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

13 A professionalism program taken after the acts that gave rise to the charges in the
14 Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board
15 or its designee, be accepted towards the fulfillment of this condition if the program would have
16 been approved by the Board or its designee had the program been taken after the effective date of
17 this Decision.

18 Respondent shall submit a certification of successful completion to the Board or its
19 designee not later than 15 calendar days after successfully completing the program or not later
20 than 15 calendar days after the effective date of the Decision, whichever is later.

21 5. PSYCHIATRIC EVALUATION. On whatever periodic basis may be required by the
22 Board or its designee, Respondent shall undergo and complete a psychiatric evaluation (and
23 psychological testing, if deemed necessary) by a Board-appointed board certified psychiatrist,
24 who shall consider any information provided by the Board or designee and any other information
25 the psychiatrist deems relevant, and shall furnish a written evaluation report to the Board or its
26 designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not
27 be accepted towards the fulfillment of this requirement. Respondent shall pay the cost of all
28 psychiatric evaluations and psychological testing.

Respondent shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the Board or its designee.

6. MONITORING - PRACTICE. Within 30 calendar days of the effective date of this Decision, Respondent shall submit to the Board or its designee for prior approval as a practice monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with Respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in Respondent's field of practice, and must agree to serve as Respondent's monitor. Respondent shall pay all monitoring costs.

The Board or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement for approval by the Board or its designee.

Within 60 calendar days of the effective date of this Decision, and continuing throughout probation, Respondent's practice shall be monitored by the approved monitor. Respondent shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation.

If Respondent fails to obtain approval of a monitor within 60 calendar days of the effective date of this Decision, Respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a monitor is approved to provide monitoring responsibility.

The monitor(s) shall submit a quarterly written report to the Board or its designee which

1 includes an evaluation of Respondent's performance, indicating whether Respondent's practices
2 are within the standards of practice of medicine, and whether Respondent is practicing medicine
3 safely, billing appropriately or both. It shall be the sole responsibility of Respondent to ensure
4 that the monitor submits the quarterly written reports to the Board or its designee within 10
5 calendar days after the end of the preceding quarter.

6 If the monitor resigns or is no longer available, Respondent shall, within 5 calendar days of
7 such resignation or unavailability, submit to the Board or its designee, for prior approval, the
8 name and qualifications of a replacement monitor who will be assuming that responsibility within
9 15 calendar days. If Respondent fails to obtain approval of a replacement monitor within 60
10 calendar days of the resignation or unavailability of the monitor, Respondent shall receive a
11 notification from the Board or its designee to cease the practice of medicine within three (3)
12 calendar days after being so notified. Respondent shall cease the practice of medicine until a
13 replacement monitor is approved and assumes monitoring responsibility.

14 In lieu of a monitor, Respondent may participate in a professional enhancement program
15 approved in advance by the Board or its designee that includes, at minimum, quarterly chart
16 review, semi-annual practice assessment, and semi-annual review of professional growth and
17 education. Respondent shall participate in the professional enhancement program at Respondent's
18 expense during the term of probation.

19 7. NOTIFICATION. Within seven (7) days of the effective date of this Decision, the
20 Respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the
21 Chief Executive Officer at every hospital where privileges or membership are extended to
22 Respondent, at any other facility where Respondent engages in the practice of medicine,
23 including all physician and locum tenens registries or other similar agencies, and to the Chief
24 Executive Officer at every insurance carrier which extends malpractice insurance coverage to
25 Respondent. Respondent shall submit proof of compliance to the Board or its designee within 15
26 calendar days.

27 This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

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1 8. OBEY ALL LAWS. Respondent shall obey all federal, state and local laws, all rules
2 governing the practice of medicine in California and remain in full compliance with any court
3 ordered criminal probation, payments, and other orders.

4 9. QUARTERLY DECLARATIONS. Respondent shall submit quarterly declarations
5 under penalty of perjury on forms provided by the Board, stating whether there has been
6 compliance with all the conditions of probation.

7 Respondent shall submit quarterly declarations not later than 10 calendar days after the end
8 of the preceding quarter.

9 10. GENERAL PROBATION REQUIREMENTS.

10 Compliance with Probation Unit

11 Respondent shall comply with the Board's probation unit.

12 Address Changes

13 Respondent shall, at all times, keep the Board informed of Respondent's business and
14 residence addresses, email address (if available), and telephone number. Changes of such
15 addresses shall be immediately communicated in writing to the Board or its designee. Under no
16 circumstances shall a post office box serve as an address of record, except as allowed by Business
17 and Professions Code section 2021(b).

18 Place of Practice

19 Respondent shall not engage in the practice of medicine in Respondent's or patient's place
20 of residence, unless the patient resides in a skilled nursing facility or other similar licensed
21 facility.

22 License Renewal

23 Respondent shall maintain a current and renewed California physician's and surgeon's
24 license.

25 Travel or Residence Outside California

26 Respondent shall immediately inform the Board or its designee, in writing, of travel to any
27 areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty
28 (30) calendar days.

1 In the event Respondent should leave the State of California to reside or to practice,
2 Respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of
3 departure and return.

4 11. INTERVIEW WITH THE BOARD OR ITS DESIGNEE. Respondent shall be
5 available in person upon request for interviews either at Respondent's place of business or at the
6 probation unit office, with or without prior notice throughout the term of probation.

7 12. NON-PRACTICE WHILE ON PROBATION. Respondent shall notify the Board or
8 its designee in writing within 15 calendar days of any periods of non-practice lasting more than
9 30 calendar days and within 15 calendar days of Respondent's return to practice. Non-practice is
10 defined as any period of time Respondent is not practicing medicine as defined in Business and
11 Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct
12 patient care, clinical activity or teaching, or other activity as approved by the Board. If
13 Respondent resides in California and is considered to be in non-practice, Respondent shall
14 comply with all terms and conditions of probation. All time spent in an intensive training
15 program which has been approved by the Board or its designee shall not be considered non-
16 practice and does not relieve Respondent from complying with all the terms and conditions of
17 probation. Practicing medicine in another state of the United States or Federal jurisdiction while
18 on probation with the medical licensing authority of that state or jurisdiction shall not be
19 considered non-practice. A Board-ordered suspension of practice shall not be considered as a
20 period of non-practice.

21 In the event Respondent's period of non-practice while on probation exceeds 18 calendar
22 months, Respondent shall successfully complete the Federation of State Medical Board's Special
23 Purpose Examination, or, at the Board's discretion, a clinical competence assessment program
24 that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model
25 Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

26 Respondent's period of non-practice while on probation shall not exceed two (2) years.

27 Periods of non-practice will not apply to the reduction of the probationary term.

28 Periods of non-practice for a Respondent residing outside of California will relieve

Respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing..

13. COMPLETION OF PROBATION. Respondent shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, Respondent's certificate shall be fully restored.

14. VIOLATION OF PROBATION. Failure to fully comply with any term or condition of probation is a violation of probation. If Respondent violates probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against Respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

15. LICENSE SURRENDER. Following the effective date of this Decision, if Respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may request to surrender his or her license. The Board reserves the right to evaluate Respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, Respondent shall within 15 calendar days deliver Respondent's wallet and wall certificate to the Board or its designee and Respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

16. PROBATION MONITORING COSTS. Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of

1 California and delivered to the Board or its designee no later than January 31 of each calendar
2 year.

3 ACCEPTANCE

4 I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully
5 discussed it with my attorney, Tom Still. I understand the stipulation and the effect it will have
6 on my Physician's and Surgeon's Certificate. I enter into this Stipulated Settlement and
7 Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the
8 Decision and Order of the Medical Board of California.

9
10 DATED: 5/9/2019 
11 MICHAEL WARREN CLUCK, M.D.
12 Respondent

13 I have read and fully discussed with Respondent MICHAEL WARREN CLUCK, M.D. the
14 terms and conditions and other matters contained in the above Stipulated Settlement and
15 Disciplinary Order. I approve its form and content.

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17 DATED: 5-9-2019 
18 TOM STILL
19 Attorney for Respondent

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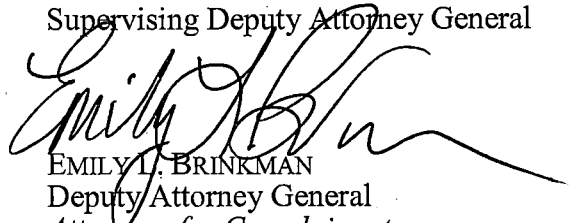
ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Medical Board of California.

Dated: *May 10, 2019*

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
JANE ZACK SIMON
Supervising Deputy Attorney General


EMILY L. BRINKMAN
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

Accusation No. 800-2016-020634

1 XAVIER BECERRA
Attorney General of California
2 JANE ZACK SIMON
Supervising Deputy Attorney General
3 EMILY L. BRINKMAN
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455 Golden Gate Avenue, Suite 11000
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7 Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO Dec 12 20 18
BY [Signature] ANALYST

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9 BEFORE THE
MEDICAL BOARD OF CALIFORNIA
10 DEPARTMENT OF CONSUMER AFFAIRS
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13 In the Matter of the Accusation Against:

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14 Michael Warren Cluck, M.D.
2516 Samaritan Dr, Suite B
15 San Jose, CA 95124-4108

ACCUSATION

16 Physician's and Surgeon's Certificate
No. A 76201,
17

Respondent.
18

19
20 Complainant alleges:

21 PARTIES

22 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
23 capacity as the Executive Director of the Medical Board of California, Department of Consumer
24 Affairs (Board).

25 2. On or about August 15, 2001, the Medical Board issued Physician's and Surgeon's
26 Certificate Number A 76201 to Michael Warren Cluck, M.D. (Respondent). The Physician's and
27 Surgeon's Certificate was in full force and effect at all times relevant to the charges brought
28 herein and will expire on April 30, 2019, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Board deems proper.

5. Section 2234 of the Code, states, in relevant part:

"The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

".....

"(f) Any action or conduct which would have warranted the denial of a certificate.

"....."

6. Section 2236 of the Code states:

"(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

"(b) The district attorney, city attorney, or other prosecuting agency shall notify the Medical Board of the pendency of an action against a licensee charging a felony or misdemeanor immediately upon obtaining information that the defendant is a licensee. The notice shall identify the licensee and describe the crimes charged and the facts alleged. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds a license as a physician and surgeon.

"(c) The clerk of the court in which a licensee is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the board. The

1 division may inquire into the circumstances surrounding the commission of a crime in order to fix
2 the degree of discipline or to determine if the conviction is of an offense substantially related to
3 the qualifications, functions, or duties of a physician and surgeon.

4 “(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to
5 be a conviction within the meaning of this section and Section 2236.1. The record of conviction
6 shall be conclusive evidence of the fact that the conviction occurred.”

7 7. Section 2239 states:

8 “(a) The use or prescribing for or administering to himself or herself, of any controlled
9 substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic
10 beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to
11 any other person or to the public, or to the extent that such use impairs the ability of the licensee
12 to practice medicine safely or more than one misdemeanor or any felony involving the use,
13 consumption, or self-administration of any of the substances referred to in this section, or any
14 combination thereof, constitutes unprofessional conduct. The record of the conviction is
15 conclusive evidence of such unprofessional conduct.

16 “(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is
17 deemed to be a conviction within the meaning of this section. The Division of Medical Quality
18 may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing
19 may order the denial of the license when the time for appeal has elapsed or the judgment of
20 conviction has been affirmed on appeal or when an order granting probation is made suspending
21 imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4
22 of the Penal Code allowing such person to withdraw his or her plea of guilty and to enter a plea of
23 not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint,
24 information, or indictment.”

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1 **CAUSE FOR DISCIPLINE**

2 **(Criminal Conviction)**

3 8. Respondent Michael Warren Cluck, M.D. is subject to disciplinary action under
4 sections 2234, 2236, and 2239 in that he was convicted of driving under the influence with a
5 blood alcohol concentration higher than 0.15%. The circumstances are as follows:

6 9. On or about February 20, 2016, at approximately 12:13 a.m., San Jose Police
7 Department Officers were dispatched to a solo vehicle crash. Officers spoke with a witness at the
8 scene who observed Respondent drive his vehicle, hit a fire hydrant without stopping, and
9 subsequently hit a parked car and fence. Officers noted that Respondent smelled of alcohol, had
10 red, bloodshot, and watery eyes. Respondent admitted he drank two martinis prior to driving.
11 Respondent failed the field sobriety tests, including a preliminary alcohol screening test which
12 resulted in a 0.16% breath alcohol concentration.

13 10. A chemical test showed a blood alcohol content of 0.210% and 0.209%.

14 11. On or about March 28, 2016, the Santa Clara District Attorney's Office charged
15 Respondent with driving under the influence (Vehicle Code sections 23152(a) & 23152(b)),
16 special allegations that Respondent had a blood alcohol concentration over 0.15% (Vehicle Code
17 section 23578); and hit and run causing property damage (Vehicle Code section 20002(a)) in
18 *People v. Michael Warren Cluck*, Santa Clara Superior Court Case No. 16006786 MWC SCIT.

19 12. On or about May 19, 2016, Respondent pled no contest to count two of the complaint,
20 driving under the influence with a blood alcohol concentration higher than 0.08% and he admitted
21 the special allegation of having a blood alcohol concentration higher than 0.15%. The Court
22 placed Respondent on probation for three years with various terms and fines.

23 **PRAYER**

24 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
25 and that following the hearing, the Medical Board of California issue a decision:

26 1. Revoking or suspending Physician's and Surgeon's Certificate Number A 76201,
27 issued to Michael Warren Cluck, M.D.;


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1 2. Revoking, suspending or denying approval of Michael Warren Cluck, M.D.'s
2 authority to supervise physician assistants and advanced practice nurses;

3 3. Ordering Michael Warren Cluck, M.D., if placed on probation, to pay the Board the
4 costs of probation monitoring; and

5 4. Taking such other and further action as deemed necessary and proper.

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7 DATED: December 12, 2018 .


KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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